

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN -7 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE PINAL COUNTY MENTAL
HEALTH NO. MH-201000122

) 2 CA-MH 2010-0010
) DEPARTMENT A
)
) MEMORANDUM DECISION
) Not for Publication
) Rule 28, Rules of Civil
) Appellate Procedure
)
)
)
)

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Honorable Janna L. Vanderpool, Judge

VACATED

James P. Walsh, Pinal County Attorney
By Catherine M. Bohland

Florence
Attorneys for Appellee

Mary Wisdom, Pinal County Public Defender
By Lisa M. Surhio

Florence
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a hearing on a petition for court-ordered treatment pursuant to A.R.S. § 36-533, the trial court found appellant was “persistently or acutely disabled” as a result of a mental disorder and was “unwilling or unable to accept voluntary [psychiatric] treatment,” and ordered him to receive a combination of inpatient and outpatient treatment. On appeal, appellant contends his due process rights were violated because of the lack of strict compliance with § 36-533 and related civil commitment statutes. Specifically, he contends neither of the two psychiatrists whose affidavits had been submitted in support of the petition and who testified at the commitment hearing had conducted a proper physical examination, as that term is contemplated by A.R.S. § 36-501(14), and that one of them did not meet with appellant personally but rather evaluated him through “TeleMed,” a telemedicine system that utilizes video-conferencing technology. We agree with appellant, as does the state, that our recent decision in *In re Pinal County Mental Health No. MH-201000029*, 225 Ariz. 500, 240 P.3d 1262 (App. 2010), is directly on point and determinative of the issue raised in this appeal. We therefore vacate the court’s order.

¶2 The record establishes that psychiatrist Adeola Adelayo filed a petition for court-ordered treatment pursuant to § 36-533, which was supported by his affidavit and that of psychiatrist Dr. Michael Vines. Appellant filed a motion to dismiss the petition on the ground that there must be strict compliance with the relevant statutes in civil commitment proceedings and that the petition did not comply with the requirements of § 36-533(C). *See In re MH 2006-000490*, 214 Ariz. 485, ¶ 10, 154 P.3d 387, 390 (App. 2007) (strict compliance with statutory requirements in civil commitment proceedings

imperative because such “proceedings may result in a serious deprivation of appellant’s liberty interests”), *quoting In re Maricopa County Super. Ct. No. MN 2001-001139*, 203 Ariz. 351, ¶ 12, 54 P.3d 380, 382 (App. 2002). Appellant argued the statute, together with A.R.S. § 36-501(14), which defines examination, requires a physician to examine the individual personally and to conduct a “complete physical examination” relating to a person’s physical status, not just his mental status. He asserted that Vines¹ did not physically examine him because whatever examination there had been did not focus on his physical state and was conducted remotely through Telemed, which is not an in-person, personal, “complete physical examination.” *See* § 36-533(B) (requiring “examinations” by two physicians); § 36-501(14) (defining “[e]xamination” as “an exploration of the person’s past psychiatric history and of the circumstances leading up to the person’s presentation, a psychiatric exploration of the person’s present mental condition and a complete physical examination”).

¶3 At the beginning of the September 1, 2010, hearing on the petition for court-ordered treatment, the trial court first addressed and allowed the parties to argue the motion to dismiss the petition, subsequently denying the motion. Vines and Adelayo then testified, essentially confirming the contents of their respective affidavits. At the end of the hearing, appellant reiterated his argument regarding Vines’s evaluation. The court granted the petition and this appeal followed.

¹In the motion appellant referred to another doctor, but that is clearly an error; the record establishes it was Vines who had used the Telemed technology to evaluate appellant.

¶4 Appellant again asserts the petition and the trial court’s subsequent order were defective because Vines did not conduct a complete, personal, and in-person physical examination as required by the relevant statutes and that this lack of strict compliance with the statutes violated his due process rights and requires us to vacate the order.² He contends that in *Pinal County Mental Health No. MH-201000029*, decided on October 6, a little over a month after the trial court issued its September 1, 2010 order, we addressed the very same issue he raises here and found an evaluation conducted through the Telemed video conferencing system failed to comply with the relevant statutes. Appellant is correct.

¶5 In *Pinal County No. MH-201000029*, we determined that, “[t]ogether, §§ 36-533(B) and 36-501(14) require that two physicians must each personally conduct a ‘complete physical examination’ of the patient.” 225 Ariz. 500, ¶ 7, 240 P.3d at 1264; *see also In re Pinal County Mental Health No. MH-201000076*, 596 Ariz. Adv. Rep. 24, ¶¶ 4-5 (Ct. App. Nov. 22, 2010) (following *Pinal County No. MH-201000029*, vacating treatment and commitment order because psychiatrist evaluated appellant remotely). One of the two psychiatrists in *Pinal County No. MH-201000029* had evaluated the appellant through the Telemed system and had “relied on a written report of appellant’s vital signs

²Appellant also seems to argue neither psychiatrist conducted what may be regarded as a complete physical examination, having focused on his mental status rather than his physical condition. But in the trial court he only challenged the sufficiency of Vines’s examination on the ground that Vines had conducted the examination remotely through the Telemed system. We address only the issue preserved for appellate review; arguments raised for the first time on appeal generally are regarded as waived. *See In re Pima County Mental Health No. MH-1140-6-93*, 176 Ariz. 565, 568, 863 P.2d 284, 287 (App. 1993).

previously taken by a nurse practitioner, [but had] not conduct[ed] a complete physical examination himself.” 225 Ariz. 500, ¶ 21, 240 P.3d at 1268. Therefore, we concluded, the evaluation did not comply strictly with the statute. *Id.* We suggested, also, that neither psychiatrist appeared to have conducted an adequate, complete physical examination, having focused on the appellant’s “alleged mental disorder rather than his overall health.” *Id.* ¶ 21 & n.10.

¶6 We acknowledged in *Pinal County No. MH-201000029*, that in *In re MH 2008-000438*, 220 Ariz. 277, n.3, 205 P.3d 1124, 1127 n.3 (App. 2009), Division One of this court had stated in a footnote that a complete physical examination for purposes of the statute “‘is not the typical annual physical but a component of a psychiatric examination, which includes observing the patient’s demeanor and physical presentation, and can aid in diagnosis.’” *Id.* ¶ 18. We noted Division One subsequently reiterated “this statement without analysis,” in *In re MH 2009-002120*, 225 Ariz. 284, ¶ 5, 237 P.3d 637, 640 (App. 2010). *Id.* n.8. But, we observed, “the question of what constitutes a ‘complete physical examination’ was neither squarely before the court in *MH 2008-000438* nor essential to the court’s disposition.” *Id.* ¶ 19. Thus, we agree with appellant in the case now before us that *MH 2008-000438* is not persuasive authority supporting the court’s order.

¶7 For the same reason the evaluations in *Pinal County No. MH-201000029* and *Pinal County Mental Health No. MH-201000076*, did not satisfy the requirements of the relevant statutes, Vines’s evaluation here, too, was deficient. As we stated in *Pinal*

County No. MH-201000076, 596 Ariz. Adv. Rep. 24, ¶ 5, “[w]hen the statutory requirements are not complied with strictly, we are required to vacate the order.”

¶8 The trial court’s order of September 1, 2010, finding appellant persistently or acutely disabled and subjecting him to a combination of residential and non-residential treatment is vacated.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge